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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA Plaintiff, vs. ROGER DELANE WILSON, Defendant.	Case No. **CR201700516** Hon. James L. Conlogue DIVISION V **STATE'S RESPONSE TO MOTION FOR CHANGE OF VENUE**

The State of Arizona, through the Cochise County Attorney, Brian M. McIntyre, and Lori A. Zucco, his Chief Criminal Deputy, hereby responds to Defendant's Motion for Change of Venue with the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

Defendant cites to numerous articles that have been published about this case but does not attach any of them to his motion or include any data regarding distribution, reader numbers, followers, population, etc. Defendant has the burden of proving that the dissemination of the alleged prejudicial material probably will result in Defendant being deprived of a fair trial. This is difficult to ascertain without the content of the articles being part of the record, as well as other relevant data.

The State would request the hyperlinks to the articles and leave to supplement this response. The State would also request leave to supplement the record after the testimony of Dr. Gorgueiro at the evidentiary hearing set next month.

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LAW AND ARGUMENT:

1. THE PRE-TRIAL PUBLICITY IS NOT SO OUTRAGEOUS SO AS TO GIVE RISE TO A PRESUMPTION OF PREJUDICE

First, Defendant argues that outrageous, unfair, prejudicial, and pervasive pretrial publicity dictates that prejudice requiring a change of venue should be presumed—making a showing of actual prejudice unnecessary. Juror exposure to information about an offense charged ordinarily does not raise a presumption that a defendant was denied a fair trial. *State v. Bible,* 175 Ariz. 549,563 (1993), citing *Murphy v. Florida*, 421 U.S. 794, 799, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975). If, however, a defendant can show pretrial publicity so outrageous that it promises to turn the trial into a mockery of justice or a mere formality, prejudice will be presumed without examining the publicity's actual influence on the jury. *Bible* at 563 (citations omitted).

The burden to show that pretrial publicity is presumptively prejudicial clearly rests with the defendant and is "extremely heavy." *Bible* at 564, citing *Coleman v. Kemp,* 778 F.2d 1487, 1537 (11th Cir.1985), cert. denied, 476 U.S. 1164, 106 S.Ct. 2289, 90 L.Ed.2d 730 (1986). In varying procedural contexts, appellate courts have found that the issue of presumed prejudice is a question of fact or a mixed question of law and fact resulting in standards of review including "manifest error," "clearly erroneous," and others. *Bible* at 564 (citations omitted). Due in large part to the findings required, courts rarely presume prejudice due to outrageous pretrial publicity. *Id.* The *Bible* Court, in finding that the pre-trial publicity in that case did not give rise to a presumption of prejudice, went on to state:

> To presume prejudice, we must necessarily disregard the results of voir dire examination as well as the circumstances surrounding pretrial proceedings and reach our own conclusion based on the totality of the circumstances from the entire record. *See Pamplin v. Mason*, 364 F.2d 1, 6 (5th Cir.1966). We must also find that the defendant has shown "inflammatory and prejudicial pretrial publicity that so pervaded the community as to render virtually impossible a fair trial before an impartial jury." *Coleman*, 778 F.2d

at 1540. In short, to presume prejudice, we must necessarily decide that the publicity was so unfair, so prejudicial, and so pervasive that we cannot give any credibility to the jurors' answers during voir dire affirming their ability to decide the case fairly.

Bible at 565.

When one compares the pre-trial publicity in this case to that found in the *Bible* case and the cases cited within that opinion, the publicity in this case is not outrageous.

Much of the reporting in this case has been favorable to Defendant, especially the reporting/blogging of David Morgan and his successful challenge to the County Attorney's request for Preliminary Injunction. The actual reporting by legitimate news outlets has been fact-based and not outrageous or prejudicial at all.

The *Bible* Court looked at when pre-trial publicity has traditionally been found to be at a level where prejudice would be presumed:

> "The circumstances in this case fall short of those rare and unusual cases where this difficult showing has been made. See, e.g., [*Rideau v. Louisiana,* 373 U.S. 723, 726-727 (1963)] (televised "confession" seen by many potential jurors); *Coleman*, 778 F.2d at 1538–1543 (overwhelming publicity in county with population of 7000); *Isaacs v. Kemp,* 778 F.2d 1482, 1483–84 (11th Cir.1985) (companion case to *Coleman*); *United States v. Denno*, 313 F.2d 364, 366–67, 372 (2d Cir.) (en banc) (6–3 decision) (extensive pretrial publicity including defendant's confession; "[t]he publicity was in its nature highly inflammatory, in volume great, and accessibility universal."), cert. denied, 372 U.S. 978, 83 S.Ct. 1112, 10 L.Ed.2d 143 (1963); cf. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) (overwhelming pretrial publicity, coupled with publicity at trial and outrageous trial conduct, required reversal). These cases show more in the way of inaccurate as well as extremely prejudicial pretrial publicity than does the totality of the record in this case. These cases also demonstrate the media's successful and sometimes relentless attempt to whip up hysteria and passion in the community—something the present case lacks. And at least *Sheppard* contains something else lacking in this case—the media successfully influencing law enforcement officers and court personnel as well as the court itself. See *Sheppard*, 384 U.S. at 337, 354–58, 362, 86 S.Ct. at 1518–20, 1522.

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Nor is the substance of the pretrial publicity in the present case comparable to that in *Rideau*, where a local television station thrice showed the defendant's confession.

> "In *Rideau* the defendant had 'confessed' under police interrogation to the murder of which he stood convicted. A 20–minute film of his confession was broadcast three times by a television station in the community where the crime and the trial took place. In reversing, the Court did not examine the voir dire for evidence of actual prejudice because it considered the trial under review 'but a hollow formality'—the real trial had occurred when tens of thousands of people, in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras."
>
> *State v. Atwood*, 171 Ariz. 576, 631, (quoting Murphy, 421 U.S. at 799, 95 S.Ct. at 2035–36); see also *Coleman*, 778 F.2d at 1491–1537."
>
> *Bible* at 565.

The *Bible* Court went on to conclude:

> On this record, we cannot conclude that the trial was "utterly corrupted" by pretrial publicity, *Murphy*, 421 U.S. at 798, 95 S.Ct. at 2035, and therefore will not presume prejudice, see *Atwood*, 171 Ariz. at 631, 832 P.2d at 648; *State v. LaGrand*, 153 Ariz. 21, 34, 734 P.2d 563, 576, cert. denied, 484 U.S. 872, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987); *State v. Greenawalt,* 128 Ariz. 150, 164, 624 P.2d 828, 842, cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981).6 Accordingly, we turn to the issue of whether the record demonstrates actual prejudice.
>
> *Bible* at 565.

The pre-trial publicity in this case falls short of the standards set by the Court in *Bible,* so prejudice should not be presumed. We should now turn the question of actual prejudice.

2. THE PRE-TRIAL PUBLICITY HAS NOT BEEN SHOWN TO HAVE ACTUALLY PREJUDICED DEFENDANT.

Defendant next claims actual prejudice based on an oral argument made by a Deputy County Attorney at the hearing on a preliminary injunction of a Facebook post. Arguments of counsel are not evidence and although Mr. Morgan's publication of the

grand jury transcript has the potential to taint the jury pool, as acknowledged by the Deputy County Attorney who litigated that issue, it remains to be seen if the publication actually prejudiced Defendant. Perhaps a pre-trial juror questionnaire, mailed out weeks before a scheduled trial date, would be one way to determine if actual prejudice has occurred in this case.

CONLCUSION:

Wherefore, because the pre-trial publicity in this case is not outrageous in comparison to the pre-trial publicity in *Bible* and the cases cited therein, and because Defendant has not demonstrated actual prejudice, the State requests that Defendant's Motion for Change of Venue be **DENIED.**

RESPECTFULLY SUBMITTED this 16th day of June 2019.

COCHISE COUNTY ATTORNEY

By: Lori Zucco

LORI ANN ZUCCO
Deputy County Attorney

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Copy of the foregoing
mailed/delivered/faxed
this 16th day of June 2019 to:

The Honorable James L. Conlogue
Judge of the Superior Court
Division V
Bisbee, Arizona 85603

Steven D. West, Esq.
Attorney for the Defendant